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IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IN RE NATIONAL SECURITY AGENCY TELECOMMUNICATIONS RECORDS LITIGATION This Document Relates To: ALL ACTIONS	)	**No. M:06-cv-01791-VRW** **DECLARATION OF ANTHONY J. COPPOLINO IN SUPPORT OF ADMINISTRATIVE MOTION OF THE UNITED STATES TO CHANGE TIME (CIV. L.R. 6-3) AND FOR A SCHEDULING ORDER**

I, ANTHONY J. COPPOLINO, do hereby state and declare as follows:

1. I am Special Litigation Counsel for the United States Department of Justice, Civil Division, Federal Programs Branch, and one of the counsel of record for the United States in this action. I make this declaration pursuant to Civil Local Rule 6-3 in support of the United States' Administration Motion to Change Time and for a Scheduling Order. The statements made

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herein are based on my personal knowledge and information provided to me in the course of my official duties. I describe below the schedule the United States is requesting (Part A); the reasons we seek additional time (Part B); and the considerable efforts I have undertaken to resolve this without Court intervention (Part C). As also noted below, our proposal would constitute the first modification to the schedule and would not impact the overall schedule for the case (Parts D and E).

A. Schedule Requested

2. The United States has requested that the following schedule be entered for dispositive motions in response to the *Verizon* master complaint and other claims against the *Verizon* Defendants in *Bready* (06-06313) and *Chulsky* (06-6570) actions.

DATE OF FILING	FILING
April 20, 2007	United States' Motion to Dismiss or, in the Alternative, for Summary Judgment and Any State Secrets Privilege Assertion
April 30, 2007	Verizon Defendants' Motion to Dismiss
May 25, 2007	Plaintiffs' Oppositions
June 8, 2007	Reply Briefs of the United States and Verizon Defendants.
June 22, 2007 (or as soon thereafter as the Court determines)	Hearing on *Verizon* Motions

B. Reasons for Requested Extension; Harm Absent Extension (Civ. L.R. 6-3(1) and (3))

3. By order dated February 20, 2007 (Dkt. 172), the Court granted and denied in part the United States' motion to stay further proceedings in this MDL action pending resolution of the appeal in *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974 (N.D. Cal. 2006). *See* Dkt. 67. With respect to non-*Hepting* cases, the Court held that, unless the parties stipulated to a stay by March 8, 2007, the Defendants must answer or otherwise respond to pending complaints by March 29, 2007. Upon conferring with Plaintiffs, the United States learned that Plaintiffs would not agree to stay further proceedings in at least five pending actions: (1) cases against the *Verizon* Defendants consolidated in the master *Verizon* complaint, *see* Dkt. 125 (1/16/07); (2) cases

against the *BellSouth* Defendants consolidated in the master *BellSouth* complaint, *see* Dkt. 126 (1/16/07); (3) separate claims against the Verizon Defendants in the *Bready* (06-06313) and (4) *Chulsky* (06-6570) actions; and (5) claims brought solely against the United States in *Shubert v. Bush* (07-693).

4. Because of the various tracks that will be proceeding, the United States sought agreement to a coordinated schedule designed to ensure an efficient and logical progression of work. As part of that proposal, and because of the substantial work associated with preparing an assertion of the state secrets privilege, the United States sought a modest three-week extension (from March 29 to April 20) in which to file its first dispositive motion. The parties in two matters (the *BellSouth* consolidated master complaint and the *Shubert* complaint against the United States) have agreed to separate schedules for a response to the complaints in those cases. However, Plaintiffs who have brought claims in this MDL proceeding against MCI (hereafter the "MCI Plaintiffs") refused to accommodate the United States' request. In refusing to consent to even this short extension, the MCI Plaintiffs linked any agreement on a schedule to their demand that the United States (and the Verizon Defendants) file dispositive motions *solely* with respect to the MCI claims at issue in the *Verizon* master complaint.

5. A brief extension of time is essential for the United States complete a dispositive motion and any state secrets privilege assertion in the *Verizon* cases. A state secrets privilege assertion is a complex, sensitive, and highly significant undertaking. Any privilege assertion would involve the preparation and submission of classified information for *ex parte, in camera* review—a process that must proceed with particular care and requires close scrutiny by Government counsel and officials. Indeed, as the Court also knows, a state secrets privilege assertion *requires* personal consideration by the responsible agency head, in this case the Director of National Intelligence and, as before, the Director of the National Security Agency. Notably, since the Government's filings in *Hepting*, a new Director of National Intelligence ("DNI") has been appointed who, after personally becoming familiar with the matter at issue,

would decide whether to assert the privilege.

6. Thus, the United States cannot merely resubmit its prior filings in *Hepting* in some *pro forma* fashion. Assuming the DNI decides that the privilege should be asserted again with respect to the allegations in the *Verizon* case, the United States' submission, while likely similar in some respects to that submitted in *Hepting*, will also: take into account pertinent changes that have occurred since the *Hepting* filing, including the recent orders of the Foreign Intelligence Surveillance Court issued in January 2007, *see* Dkt. 127 (1/17/07) and Dkts. 175/176 (2/22/07); address the specific allegations and circumstances concerning defendants other than AT&T; and address the Court's *Hepting* decision and other decisions (such as *Terkel v. AT&T* and *ACLU v. NSA*) concerning the same kinds of allegations made in the *Verizon* cases. Our submission will therefore be an expanded presentation containing additional information. Because of the inherent significance of a state secrets privilege assertion, and the need to confer with two senior agency heads in connection with any such privilege assertion, as well as the need to prepare sensitive classified submissions along with comprehensive public submission, the United States would be substantially prejudiced if such an undertaking were artificially rushed to conclusion, risking the possibility that facts may be inadvertently omitted or revealed in a manner that might tend to confirm or deny classified information.

C. Efforts Made to Obtain Stipulation (Civ. L.R. 6-3(2))

7. As set forth further below, upon the Court's issuance of its February 20, 2007 Order, I undertook immediate efforts to ascertain which cases in this MDL action would proceed or be stayed by stipulation. I had several communications with counsel for the Verizon, AT&T and BellSouth Defendants. I also spoke with various counsel for the Plaintiffs, including Mr. Himmelstein, counsel for Plaintiffs who have asserted claims against MCI that were consolidated in the *Verizon* master complaint (the "MCI Plaintiffs"); Ms. Cohn, counsel for the Plaintiffs in *Hepting* and Plaintiffs' Co-lead Coordinating Counsel; Mr. Exnicios, Plaintiffs' counsel for the *BellSouth* class; and Mr. Maazel, counsel for the Plaintiffs in the *Shubert v. Bush*. I also

arranged a conference call with counsel for Plaintiffs and Defendants, distributed a proposed schedule, and held two evening conference calls with Plaintiffs to discuss the schedule. I describe these efforts below.[1]

8. On February 21-23, 2007, I conferred several times with counsel for AT&T, Verizon, and BellSouth Defendants regarding whether plaintiffs in their cases would agree to a stay of proceedings. On February 23, 2007, I learned from counsel for the Verizon Defendants that counsel representing the Plaintiffs whose claims are consolidated in the *Verizon* master complaint (*i.e.*, counsel for the MCI Plaintiffs and counsel for the Verizon Plaintiffs) disagreed both as to whether to stipulate to a stay pending the *Hepting* appeal and (if they did not agree to a stay) the schedule that should apply to the case. In particular, I was advised that Mr. Himmelstein and the MCI Plaintiffs opposed a stay of proceedings and took the position that only the claims of the MCI Plaintiffs in the *Verizon* master complaint should now be addressed in motions to dismiss. On the other hand, I was advised that counsel for the other Verizon Plaintiffs (Ms. Flowers) did not initially oppose a stay of proceedings or, if those claims proceeded, did not oppose granting the United States an extension of time to prepare any state secrets privilege assertion. In addition, I learned that the Verizon Defendants opposed bifurcating any response to the claims in the *Verizon* master complaint (a position in which the United States concurs).

9. On the evening of Friday, February 23, 2007 around 6 p.m. eastern time, I spoke with counsel for the MCI Plaintiffs (Mr. Himmelstein) who opposed a stay of proceedings as to the claims of the MCI Plaintiffs, and took the position that only those claims should be addressed in a motion to dismiss, and that he expected to oppose an extension in the time for filing dispositive motions beyond March 29, 2007.

10. On Monday, February 26, 2007, I was advised by counsel for the AT&T Defendants that

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[1] The following discussion of various conversations does not purport to summarize all of the referenced conversations, nor all statements made by all parties, but is intended to summarize the essential outcome of the conversation from my perspective.

an agreement to stay non-*Hepting* AT&T cases in this MDL had not yet been reached. I also was advised by counsel for the *BellSouth* Defendants that the parties in the *BellSouth* cases were still conferring as to a stay of proceedings.

11. Also on February 26, 2007, I sent an email to Ms. Cohn suggesting we discuss the status of Plaintiffs' response to the Court's order. Ms. Cohn and I spoke on Tuesday, February 27, 2007. She advised me, *inter alia*, that Plaintiffs were planning to confer on Thursday, March 1, 2007, about their position on the Court's Order. She indicated that she was discussing a stay stipulation with the AT&T Defendants as to the non-*Hepting* AT&T cases. She also indicated that she had preliminary information that the *BellSouth* Plaintiffs did not intend to stipulate to a stay, and further understood that the MCI plaintiffs would not relent in their position that those claims proceed alone with a response due on March 29, 2007. I indicated that the United States expected to seek an extension of that date and needed to know the various Plaintiffs' position as to which cases would proceed in order to propose a coordinated schedule to Plaintiffs and, if necessary, the Court. Ms. Cohn expressed some uncertainty as to whether Plaintiffs would have a final position on all matters by Friday, March 2, 2007.

12. On Tuesday, February 27, 2007, I conferred again with counsel for the AT&T, BellSouth and Verizon Defendants to ascertain the status of stay stipulations in their cases and learned that discussions had not concluded concerning whether the non-*Hepting* AT&T cases would be stayed and, likewise, that the status of further proceedings in the *BellSouth* case was not yet resolved.

13. Given the foregoing state of affairs—in which there was no clear resolution regarding what claims would and would not be proceeding—on February 28, 2007, I sent an email to counsel for Plaintiffs and Defendants proposing a joint conference call for Friday, March 2, 2007.

14. During the March 2 conference call, I solicited the Plaintiffs' position on which cases would proceed and asked for consideration of additional time for the Government's initial filings

and a coordinated schedule once it was determined what matters would proceed. Based on this call, it appeared that the non-*Hepting* AT&T cases would be stayed, but that the *Verizon* and *BellSouth* cases against telecommunications carriers, along with the *Shubert* case against the United States, might proceed to dispositive motions. Mr. Himmelstein reiterated his view that he opposed a stay of proceedings as to the claims of the MCI Plaintiffs. The *BellSouth* Plaintiffs promised a final response on their position as to a stay and further schedule by Monday, March 5, 2007. The *Shubert* Plaintiffs also indicated they would confer with me further the following week.

15. On Monday, March 5, 2007, I spoke with counsel for the *BellSouth* Plaintiffs (Mr. Exnicios), who indicated that it was likely the *BellSouth* Plaintiffs would not stipulate to a stay in *BellSouth* (although that decision was not yet final), but would not object to giving the United States "whatever we needed" to file a motion in *BellSouth* after dispositive motions were filed in the *Verizon* cases. Thus, as of March 5, it appeared that two of the three counsel for Plaintiffs in the *Verizon* and *BellSouth* cases (Ms. Flowers and Mr. Exnicios) were agreeable to extending time for briefing on forthcoming dispositive motions in those cases.

16. Also, on March 5, 2007, the *Shubert* Plaintiffs confirmed their decision not to stipulate to a stay of that case pending the *Hepting* appeal and, thus, that a distinct case against the United States as to which no motion to dismiss had yet been filed would proceed.

17. Also on March 5, 2007, I leaned from counsel for the Verizon Defendants that they had contacted Plaintiffs' counsel for the *Chulsky* and *Bready* cases, which had separate claims against *Verizon* that were not included in the master *Verizon* complaint, and that the Plaintiffs in *Bready* opposed a stay of proceedings. (Apparently no response has been received on the stay issue from the *Chulsky* Plaintiffs).

18. On March 6, 2007, counsel for the *BellSouth* Defendants indicated that it still appeared possible that the *BellSouth* parties might stipulate to a stay of proceedings. However, because it appeared likely that the *Verizon*, *BellSouth*, and *Shubert* cases would all proceed, I circulated a

proposed schedule for these cases to counsel for the parties. I proposed that the United States be granted to May 4, 2007 to respond to both the *Verizon* and *BellSouth* complaints and that the Verizon Defendants be granted to May 18, 2007 to file their own motion to dismiss, and that the Government's response in *Shubert* be filed separately on May 25, 2007 (and proceed along a different track to a separate hearing). I also proposed subsequent opposition, reply, and a hearing date for the *BellSouth* and *Verizon* cases which provided ample time (at least 60 days) for the Plaintiffs in *Verizon* and *BellSouth* to respond to the Government's motion in accordance with what I thought were the wishes of at least some of the Plaintiffs' counsel in those cases (though not counsel for the MCI Plaintiffs, Mr. Himmelstein) for that amount of time to brief the issues.[2/]

19. On Wednesday, March 7, 2007, at the Plaintiffs' request, a further conference call was held (at 8:30 pm eastern time) among counsel for the *Verizon* and *BellSouth* Defendants, Mr. Nichols and me on behalf of the United States, and Ms. Cohn representing the relevant Plaintiffs to discuss the Plaintiffs' response to the Government's proposed schedule. During this conversation, Ms. Cohn proposed an alternative schedule: that the United States and the Verizon Defendants file motions to dismiss on March 29, 2007, directed solely at the claims of the MCI Plaintiffs, and that remaining claims against *Verizon*, as well as claims against *BellSouth*, not be addressed until after a decision on the MCI-only claims. Ms. Cohn further proposed that briefing on the "MCI-only" motion culminate in a hearing on June 8, 2007. The United States and Verizon Defendants continued to oppose the "MCI-only" aspect of an initial dispositive motions as to the *Verizon* master complaint.

20. On Thursday, March 8, 2007 (again at 8:30 pm eastern), Mr. Nichols and I spoke again

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[2] I also proposed a schedule for supplemental filings and a hearing in another pending case against the United States, *Center for Constitutional Rights v. Bush* (07-01115). However, because no deadline existed in the *CCR* case that required immediate attention (since dispositive motions have already been filed in that case), I turned all my efforts to resolving the scheduling dispute in the *Verizon* cases. I intend to confer further with the Plaintiffs in *CCR* on the scheduling of MDL proceedings in that action.

by phone with Ms. Cohn to ascertain whether any agreement was possible on a schedule and the scope of initial motions. Specifically in response to her March 7 proposal, we indicated our general agreement to moving any briefing in the *BellSouth* case to after a decision on a *Verizon* dispositive motions and then focused on the two issues remaining in potential dispute: (i) whether the Plaintiffs would agree to any extension of the March 29 deadline regardless of the scope of the motions to dismiss; and (ii) whether the Plaintiffs would agree to address motions to dismiss the *Verizon* master complaint, rather than just the claims of the MCI Plaintiffs. We proposed to Ms. Cohn that the United States be granted to April 20, 2007 to respond to the master *Verizon* complaint, and that the Verizon Defendants would follow suit with their dispositive motion on April 30, 2007 (thus substantially shortening our original schedule for opening motions by the United States and Verizon Defendants). We proposed further that Plaintiffs' opposition would be due on May 25, 2007, with replies on June 8, 2007, and a hearing on June 22, 2007— just two weeks after Ms. Cohn's proposed hearing date for the MCI-only claims. We asked Ms. Cohn if the parties could at least agree on the schedule and, thus, sought to determine whether we would be taking one or two issues to the Court—the requested extension of time and/or whether "MCI-only" claims should proceed.

21. Also on March 8, 2007, a stipulation staying further proceedings in the non-*Hepting* actions against AT&T was finalized, and I consented to my electronic signature on the stipulation.

22. On Friday, March 9, 2007, at 4:36 pm eastern time, I received an email from Ms. Cohn rejecting the United States' scheduling proposal of March 8. Plaintiffs reiterated their position that motions to dismiss should proceed solely as to the MCI allegations for filing on March 29, 2007 and a hearing by June 8, 2007. Thus, Plaintiffs refused to consent to a three-week extension of the March 29 deadline. In their proposed schedule, Plaintiffs represented that their proposal to defer motions regarding the *BellSouth* master complaint (to which the United States agreed) would not be applicable if the United States and Verizon Defendants declined to accede

to the demand that only the claims of the MCI Plaintiffs be addressed in motions to dismiss at this time. Ms. Cohn did convey that the Plaintiffs in *Shubert* were agreeable to the Government's proposal to schedule that case on a separate track, with the United States filing its opening motion in mid-May.

23. Also on Friday, March 9, 2007, I received an email from counsel for the *Bready* Plaintiffs (Mr. Whitaker) indicating that the Plaintiffs in that case also oppose any extension of time to respond to their claims against *Verizon*. Thus, regardless of the MCI Plaintiffs' demand that MCI only claims proceed, the United States presently must respond to claims against Verizon (not MCI) in the *Bready* case.

24. On Monday, March 12, 2007, the parties in *BellSouth* filed a stipulation that would postpone a response to the *BellSouth* complaints. *See* Dkt. 192.

25. Also on Monday, March 12, 2007, I reached agreement on a stipulation with the Plaintiffs' counsel in *Shubert* on a separate briefing and hearing schedule for the Government's forthcoming dispositive motion in that case. *See* Dkt. 193.

D. Previous Time Modifications in the Case (Civ. L.R. 6-3 (5))

26. Prior to its February 20 Order, the Court had not set a date for responses to complaints pending in this MDL proceeding and, thus, the extension requested by the United States is the first request since the Court ruled that responses to complaints would proceed unless stayed by stipulation. On November 8, 2006, the United States moved to stay all proceedings in this MDL action pending the *Hepting* appeal, and the Court ruled on that motion on February 20, 2007 by, *inter alia*, setting the pending deadline absent agreement to a stipulated stay by the parties.

E. Effect of Modification on Schedule for the Case (Civ. L.R. 6-3(6))

27. In my view, the three-week extension requested by the United States for the *Verizon* cases should have no impact on the rest of the case, in part because it pushes back a proposed hearing on motions in that case by only two weeks (as compared to MCI Plaintiffs' proposed schedule), in part because the time requested is so short, and in part because these MDL

proceedings are not likely to reach finality before resolution of the *Hepting* appeal.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

s/ Anthony J. Coppolino
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